



Virginia
Regulatory
Town Hall

Notice of Intended Regulatory Action Agency Background Document

Agency Name:	Virginia Department of Environmental Quality
VAC Chapter Number:	9 VAC 25-650-10 et seq.
Regulation Title:	Closure Plans and Demonstration of Financial Capability
Action Title:	Proposed permanent regulation to replace emergency regulation
Date:	October 1, 2000

This information is required prior to the submission to the Registrar of Regulations of a Notice of Intended Regulatory Action (NOIRA) pursuant to the Administrative Process Act § 9-6.14:7.1 (B). Please refer to Executive Order Twenty-Five (98) and Executive Order Fifty-Eight (99) for more information.

Purpose*

The unanticipated abandonment of a sewage treatment facility by its owner or operator creates a substantial and imminent threat to the public health or the environment because of the facility ceasing operations while still receiving sewage. The State Water Control Board has therefore determined that a closure plan and demonstration of financial capability to implement the plan are appropriate for privately owned sewerage systems and sewerage treatment works in order to reduce the potential for such abandonment, or the continued operation of abandoned facilities using public funds.

The proposed regulation will require closure plans and demonstration of financial assurance for privately owned sewerage systems and sewerage treatment works that treat domestic waste generated by privately owned residences.

Basis

The basis for the proposed regulation is Section 62.1-44.15:1.1 and Section 62.1-44.18:3 of the Code of Virginia. Under Section 62.1-44.18:3, the promulgation of a regulation is mandatory. "The Department of Environmental Quality shall promulgate regulations necessary to carry out the provisions of this section." (Cite Section 62.1-44.18:3.B). Under Section 62.1-44.18:3, the

regulation is to require a Virginia Pollution Discharge Elimination System (VPDES) permit, closure plan and demonstration of financial capability to implement the plan for privately owned sewerage systems and sewerage treatment works that discharge more than 1,000 gallons per day and less than 40,000 gallons per day. Under Section 62.1-44.15:1.1, the State Water Control Board is authorized to issue special orders requiring an owner to file with the Board a closure plan, including demonstration of financial capability. "The Board is authorized to issue special orders in compliance with the Administrative Process Act (9-9.14:1 et seq.) requiring that an owner file with the Board a plan to abate, control, prevent, remove, or contain any substantial and imminent threat to public health or the environment that is reasonably likely to occur if such facility ceases operations." (Cite Section 62.1-44.15:1.1).

Need*

The unanticipated abandonment of a sewage treatment facility by its owner or operator creates a substantial and imminent threat to the public health or the environment because of the facility ceasing operations while still receiving sewage. When a sewage treatment facility is privately owned, there exists the threat of cessation of operations at the facility resulting from abandonment such that it would be reasonable to expect that operation at the facility will not be resumed by the owner or operator. When such a facility treats domestic waste generated by private residences, abatement of sewage flow to the facility is often impractical or impossible, as this may require the condemnation of property and eviction of homeowners or residents. Therefore, untreated sewage may be discharged directly to State waters, resulting in a substantial and imminent threat to public health and the environment. To protect public health and the environment, it has become necessary to continue operation of such facilities and/or connect to a publicly owned sewerage treatment works using public funds.

To ensure that there is a plan in place for continued operation in the event that a privately owned sewerage treatment system ceases operation because of abandonment and to reduce the potential for continued operation of such system using public funds, the State Water Control Board has determined that a closure plan and the demonstration of financial capability to implement the plan is appropriate.

Potential issues that may need to be addressed as the regulation is developed include the following:

- 1) Section 62.1-44.15:1.1 and Section 62.1-44.18:3 have identical requirements regarding closure plans and demonstration of financial capability. However, Section 62.1-44.18:3 is very specific as to the population of facilities to which the law applies. Section 62.1-44.15:1.1 is not specific at all in this regard. The issue is therefore to what facilities other than as specified in Section 62.1-44.18:3 the regulation will apply.
- 2) The instruments by which the State Water Control Board can require closure plans and demonstration differ under the two Sections of the State Water Control Law. Section 62.1-44.15:1.1 limits the Board to the issuance of special orders in compliance with the Administrative Process Act, whereas Section 62.1-44.18:3 does not. The issue is that if the population of facilities to which the regulation applies is expanded beyond those specified in Section 62.1-44.18:3, this disparity will need to be addressed in the regulation.

- 3) If a facility is sold or transferred in the ordinary course of business or a permit transfer in accordance with Board regulations is effected, the Board may be required to return the instrument of financial assurance to the previous owner or operator or permit holder. The potential then exists for cessation of operations after return of the instrument of financial assurance to the previous owner or operator but before receipt of financial assurance from the new owner or operator. For the regulation to be effective, the Board needs to ensure the new owner or operator will satisfy the financial assurance requirements.

Substance*

This proposed regulation will require owners or operators of privately-owned sewerage systems or sewerage treatment works to file with the State Water Control Board a closure plan to abate, control, remove, or contain any substantial or imminent threat to public health or the environment that is reasonably likely to occur if such facility ceases operations. Such plan shall also include a demonstration of financial capability to implement the plan. Financial capability may be demonstrated by the creation of a trust fund, a submission of a bond, a corporate guarantee based upon audited financial statements, or such other instruments as the Board may deem appropriate.

The regulation would not apply to facilities that qualify for a VPDES general permit for facilities that discharge 1,000 gallons per day or less. For those systems or works discharging more than 1,000 gallons per day and less than 40,000 gallons per day, the requirements will be incorporated into the VPDES permitting process. The regulation will require submittal of the closure plan as part of the application for a VPDES permit and compliance with the regulation will become an enforceable condition of the permit. In addition, the proposed regulation will include systems or works discharging more than 40,000 gallons or more per day (those subject to § 62.1-44.15:1.1). These systems or works will be required to submit a closure plan and financial assurance documentation through a Special Order, not a VPDES permit, and the requirement would be a condition for discharge to State waters. The proposed regulation will address the different means of requiring closure plans and, if possible, result in a single method of requiring closure plans preferably through the permitting process instead of an enforcement mechanism.

For the purposes of the regulation, a privately-owned sewerage system or privately-owned sewerage treatment works will be defined as a facility that treats wastes generated by private residences. Private residences include, but are not limited to, single family homes, townhouses, condominiums, mobile homes, and apartments.

For the purposes of the regulation, “ceases operation” will mean to cease conducting the normal operation of a facility under circumstances where it would be reasonable to expect that such operation will not be resumed by the owner or operator at the facility. The term shall not include the sale or transfer of a facility in the ordinary course of business or a permit transfer in accordance with Board regulations.

Alternatives*

The Department of Environmental Quality will be considering alternatives in the development of this regulation. Although several alternatives are presented here, it is anticipated that additional alternatives may be considered during the development of the regulation and the public participation process. Although one alternative presented (Alternative 6) currently forms the basis for the proposed regulation, no one alternative is currently recommended by the Department of Environmental Quality. However, some alternatives under consideration are not recommended. Alternatives already considered or to be considered include, but are not limited to, the following:

1) No Action Alternative

This alternative is not recommended. Section 62.1-44.18:3 of the Code of Virginia mandates that the Department of Environmental Quality promulgate regulations necessary to carry out the provisions of the section.

2) Limit Regulation to Facilities Identified in Section 62.1-44.18:3 of the Code of Virginia

This alternative is under consideration but is not recommended. Section 62.1-44.18:3 requires that the State Water Control Board promulgate regulations to implement the provisions of the act to be effective within 280 days of its enactment. To meet this requirement, the Department of Environmental Quality is developing an emergency regulation in accordance with Section 9-6.14:4.1(c)(5) of the Administrative Process Act. Section 62.1-44.15:1.1 of the Code of Virginia contains requirements for closure plans and demonstration of financial capability identical to the requirements of Section 62.1-44.18:3, but does not restrict the population of facilities to which it applies to those discharging more than 1,000 gallons per day and less than 40,000 gallons per day. The threat to public health or the environment created if a privately-owned sewage treatment system ceases to operate is not diminished if such a facility discharge in excess of 40,000 gallons per day. Therefore, the population of facilities subject to regulation should be increased, as authorized under Section 62.1-44.15:1.1 of the Code of Virginia.

3) Apply Regulation to All Facilities Permitted by the State Water Control Board

This alternative is not recommended. Under this alternative the regulation would apply to all facilities subject to the Virginia Pollution Elimination System (VPDES) Permit Regulation (9 VAC 25-31-10 et seq.) or to the Virginia Pollution Abatement (VPA) Permit Regulation (9 VAC 25-32-10 et seq.). The intent of the regulation is reduce the potential for continued operation of privately owned sewage treatment systems using public funds. Under this alternative, municipal sewage treatment systems, which are already operated using public funds, would be included. Therefore, this alternative is considered overly intrusive and burdensome.

4) Apply Regulation to All Privately Owned Facilities Permitted by the State Water Control Board.

This alternative is under consideration. Under this alternative the regulation would apply to all privately owned facilities subject to the Virginia Pollution Elimination System (VPDES) Permit Regulation (9 VAC 25-31-10 et seq.) and discharges subject to the Virginia Pollution Abatement (VPA) Permit Regulation (9 VAC 25-32-10 et seq.). This alternative is less intrusive than the previous alternative in that publicly-owned treatment facilities would be excluded.

Privately owned facilities that treat wastes generated by industrial facilities and pollution management activities would be required to submit a plan and demonstration of financial assurance. This alternative would thereby reduce the potential that proper decommissioning and closure of such treatment facilities would not need to be performed using public funding in the event of facility abandonment. Pollution management activities, as defined by the VPA Permit Regulation, include, but are not limited to: animal feeding operations, storage or land application of sewage, sludge, industrial waste or other waste; or the complete reuse or recycle of wastewater.

- 5) Apply Regulation to All Privately Owned Sewage Treatment Systems Permitted by the State Water Control Board that Treat Domestic Waste Generated by Private Residences.

This alternative is under consideration. Under this alternative the regulation would apply to all privately owned facilities subject to the Virginia Pollution Elimination System (VPDES) Permit Regulation (9 VAC 25-31-10 et seq.) or the Virginia Pollution Abatement (VPA) Permit Regulation (9 VAC 25-32-10 et seq.) that treat domestic waste generated by private residences. This alternative further reduces the population of affected facilities by limiting the regulation to privately owned facilities and pollution management activities that treat or handle domestic sewage and/or treatment by-products generated by private residences.

- 6) Apply Regulation to Privately Owned Sewage Treatment Systems subject to the Virginia Pollution Discharge Elimination System (VPDES) Permit Regulation (9 VAC 25-31-10 et seq.) that Treat Domestic Waste Generated by Private Residences.

This alternative is under consideration and forms the current basis for the proposed regulation. It is the least intrusive and burdensome alternative under consideration that addresses the requirements of both Section 62.1-44.15:1.1 and Section 62.1-44.18:3 of the Code of Virginia. This alternative limits the population of facilities to those subject to the VPDES permit regulation and treat domestic sewage generated by private residences. Facilities that exclusively treat industrial wastes and pollution management activities subject to the VPA Permit Regulation (9 VAC 25-32-10 et seq.) are excluded from the regulation in this alternative.

Public Participation*

The Board is seeking comments on the intended regulatory action, including ideas to assist in the development of a proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. A public meeting will be held and notice of the meeting can be found in the Calendar of Events section of the Virginia Register of Regulations.

Participatory Approach*

The Board seeks comment from the public on whether to use the participatory approach to assist the Department of Environmental Quality in the development of the proposed regulation. If sufficient interest is shown, the Department of Environmental Quality intends to form a Technical Advisory Committee (TAC) of affected owners or operators, environmental organizations, citizen groups, private citizens and other interested parties. Therefore, concerned parties interested in participating in a TAC are encouraged to show such interest by attending the public meeting or by contacting the following:

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The decision to form a TAC will be made based on the level of interest and public input received at the public meeting.

Family Impact Statement

The Department of Environmental Quality has considered the effects of this proposed regulation on the institution of the family and family stability including the extent to what the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

Because this proposed regulation will increase the cost associated with owning and operating a privately owned sewage treatment system, it is anticipated that owners or operators of such facilities will attempt to recoup this cost by increasing connection and user fees charged to customers served by the facilities. Therefore, disposable family income is anticipated to be negatively impacted for those families that utilize the services of facilities affected by the proposed regulation.